IN THE

Supreme Court of the United States

October Term, 1976

No. 76-10

CARL DENNIS CUTTING and BARRY DANIEL STILL,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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vs.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, Carl Dennis Cutting and Barry Daniel Still, respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming in part and reversing in part the judgment of conviction of the United States District Court for the Central District of California.

Opinions.

Trial was had in the United States District Court for the Central District of California and was by jury.

The United States Court of Appeals for the Ninth Circuit reversed and remanded the judgment of the aforesaid District Court by a decision dated March 26, 1975. A copy of said Opinion is attached hereto as Exhibit "A".

Subsequently a petition for rehearing en banc was granted and the United States Court of Appeals for the Ninth Circuit, as a result of said rehearing en banc, rendered its opinion and judgment affirming in part and reversing in part the judgment of the United States District Court for the Central District of California. A copy of said Opinion filed June 16, 1976 is attached hereto as Exhibit "B".

Said Opinion was modified by an Order filed June 30, 1976, a copy of said Order is attached hereto as Exhibit "C".

Grounds on Which the Jurisdiction of This Court Is Evoked.

1. The date of the judgment of the United States Court of Appeals for the Ninth Circuit sought to be reviewed is June 16, 1976, and the Order Modifying the Majority Opinion dated June 30, 1976 (Exhibits B and C).

2. A 20-Count indictment was filed against petitioners November 5, 1970. Counts 14 and 15 charged petitioners with mailing advertisements and notices giving information where, how, from whom, and by what means, obscene matter might be obtained in violation of Title 18, USC Section 1461; whereas all the remaining counts charged the petitioners with the mailing of obscene materials, either advertisements, photographs, or as in the case of Count 20, a motion picture film.

By the conclusion of the trial, the petitioner Cutting had been eliminated from Counts 3, 4, 5, 7, 17,

18 and 19. The remaining counts which applied to both petitioners were Counts 1, 2, 14, 15 and 16. The remaining counts as to petitioner Cutting alone, were Counts 6, 8, 9, 10, 11, 12, 13 and 20. The remaining counts as to Still alone were Counts 3, 4, 5, 7, 17, 18 and 19.

The petitioners were each acquitted on Count 14 and found guilty on all the remaining counts in which they were charged.

Petitioners were sentenced in the United States District Court on May 10, 1971.

Thereafter petitioners filed a timely Notice of Appeal in the United States District Court and did appeal said conviction to the United States Court of Appeals for the Ninth Circuit.

On March 26, 1975, the United States Court of Appeals for the Ninth Circuit entered its judgment reversing in part and remanding in part the judgment of the United States District Court (Exhibit A).

Thereafter, pursuant to a petition by the Government for rehearing en banc, a rehearing was granted and the judgment of the United States Court of Appeals for the Ninth Circuit, affirming in part and reversing in part, was entered June 16, 1976 (Exhibits B and C).

It is that judgment of the United States Court of Appeals for the Ninth Circuit entered on June 16, 1976 that petitioners seek this Writ of Certiorari to r[redacted]ew.

3. The statutory provision which confers jurisdiction upon this court to review the judgment in question by Writ of Certiorari is 28 U.S.C.A. Section 1254(1).

Questions Presented for Review.

1. Are the items which were the subject matter of Counts 1 through 13 and 16 through 20 legally obscene or were they entitled to the protection of the First Amendment of the United States Constitution?

2. Were the petitioners deprived of due process of law by the court giving the national standard instruction?

3. Were petitioners deprived of due process of law by giving *Miller v. California,* 43 U.S. 15 retroactive application?

4. Were petitioners deprived of due process of law by being denied an evidentiary hearing to ascertain the existence of prejudice from the giving of a national standard instruction as it might be compared to local standards, *i.e.,* are they the same or different from the national standards?

Constitutional Provisions and Statutes Involved.

Involved are the First and Fifth Amendments to the United States Constitution; Title 18 U.S. Code Section 1461.

Statement of the Case.

Petitioners seek this court's Writ of Certiorari to review the last judgment of the United States Court of Appeals for the Ninth Circuit dated June 16, 1976,

affirming in part and reversing in part, petitioners' conviction in the United States District Court by a judgment of conviction rendered following a jury trial under an indictment charging violations of Title 18, USC Section 1461.

The indictment was filed November 5, 1970 and was in 20 counts. Counts 14 and 15 charged the petitioners with mailing advertisements and notices giving information where, how, from whom, and by what means, obscene matter might be obtained in violation of Title 18, USC 1461 (said counts are no longer in the case, the jury having acquitted on Count 14 and the United States Court of Appeals for the Ninth Circuit having reversed on Count 15); all the remaining counts charged the petitioners with the mailing of obscene materials, either advertisements, photographs, or as in the case of Count 20, a motion picture film.

By the conclusion of the case, the petitioner Cutting had been eliminated from Counts 3, 4, 5, 7, 17, 18 and 19, and the jury was so instructed. The remaining counts which apply to both petitioners were Counts 1, 2, 14, 15 and 16. The remaining counts as to Cutting alone were Counts 6, 8, 9, 10, 11, 12, 13 and 20. The remaining counts as to Still alone were Counts 3, 4, 5, 7, 17, 18 and 19.

Trial in the United States District Court commenced on April 6, 1971 and concluded on April 14, 1971.

On April 14, 1971, the petitioners were each acquitted on Count 14 and found guilty on all the

remaining counts on which they were charged. By the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 16, 1976, and modified on June 30, 1976, petitioners' conviction on Count 15 was reversed.

As to all of the remaining counts in which petitioners were found guilty their conviction was affirmed by the said judgment of the United States Court of Appeals for the Ninth Circuit on June 16, 1976.

Description of the Material Involved.

The materials in Counts 10, 11, 12, 13 and 20 involved explicit sexual materials. These counts apply to petitioner Cutting only. The remaining counts do not involve explicit sexual material, but rather are still photographs of solitary male or female nude models.

For the purposes of the argument in support of granting the Writ of Certiorari these two items will be dealt with separately.

ARGUMENT.

I

Each of the Photographs and Motion Picture Involved in the Instant Case Are Entitled to the Protection of the First Amendment to the United States Constitution; That the Materials Involved Herein Are Not Obscene nor Unlawful When Considered Against Proper Constitutional Standards.

A. The materials in Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 16, 17, 18, 19 and 20 are constitutionally protected and the decision of the United States Court of Appeals for the Ninth Circuit to the contrary is in conflict with established applicable decisions of this court.

B. The items involved in Counts 10, 11, 12, 13 and 20 are not obscene and further Cutting's conviction on them was contrary to the due process provision of the Fifth Amendment to the United States Constitution, and presents an important question of federal law which has not been, but should be, settled by this court.

Firstly, petitioners would like to discuss the items contained in all counts except 10, 11, 12, 13 and 20 (for the sake of this argument, the items in Counts 10, 11, 12, 13 and 20 will be referred to as the explicit sex counts). The items involved in the counts other than the explicit sex counts involve still photographs of solitary male or female nude models.

The majority opinion of the United States Court of Appeals for the Ninth Circuit apparently justified their affirmation of the convictions on these counts, where solitary nude photographs were involved, as being obscene by referring to the reformulation of the patently

offensive concept stated in *Miller v. California* (1973) 413 U.S. 15 and in particular, apparently, that portion of the *Miller* case stating that States could proscribe "(b) patently offensive representations . . . of . . lewd exhibition of the genitals." (413 U.S. at 24).

This case was tried prior to the aforementioned *Miller* decision and was based on the *Memoirs* standards. Up until the *Miller* decision no mention of "lewd exhibition of the genitals" ever appeared in any of the cases based upon the *Roth-Memoirs* standard either in the Courts of Appeal or in this court.

It is submitted that this court put to rest the obscenity question as to the items contained in the non-explicit sex counts in the following cases involving nudity, such as the materials involved in the non-explicit sex counts.

Central Magazine Sales, Ltd. v. United States (1967) 389 U.S. 50 reversing *United States v. 392 Copies of a Magazine Entitled "Exclusive"* (Fourth Circuit 1967) 373 F.2d 633;

Potomac News Co. v. United States (1967) 389 U.S. 47 reversing *United States v. 56 Cartoons Containing 19,500 Copies of a Magzine Entitled "Hellenic Sun"* (Fourth Circuit 1967) 373 F.2d 635;

Redrup v. New York (1967) 386 U.S. 767;

United States v. Arno (Ninth Circuit 1972) 463 F.2d 731;

Pinkus v. Pitchess (Ninth Circuit 1970) 429 F.2d 416, affirmed *sub. nom. California v. Pinkus* (1970) 400 U.S. 922.

Petitioners submit that *Miller (supra)* cannot be applied retroactively to deny constitutional protection to materials that were protected under the *Roth-Memoirs* test. This court in *Hamling v. United States* (1974) 418 U.S. 102, explicitly held that *Miller* could be retroactively applied only to those appellants who would benefit from *Miller*.

It is submitted that the counts, except for 10, 11, 12, 13 and 20 should be reversed for the reasons above stated.

The following argument is submitted on behalf of all counts, including 10, 11, 12, 13 and 20, as well as the other counts. Petitioners were indicted and convicted prior to June 21, 1973 under an indictment charging violation of 18 USC 1461 involving the mailing of obscene materials. At the time of the indictment, trial and conviction of petitioners the obscenity test and definition was embodied in the three-prong test formulated in *Memoirs v. Massachusetts,* 383 U.S. 413, 418 (1966) and the jury in the case had been instructed accordingly.

On June 21, 1973, this court rendered its decision in five obscenity cases, to wit, *Miller v. California* 413 U.S. 15; *Paris Adult Theatre I v. Slaton,* 413 U.S. 49; *United States v. Orito,* 413 U.S. 139; *United States v. 12 200-ft. Reels of Super 8 mm Film,* 413 U.S. 123; and *Kaplan v. California,* 413 U.S. 115.

The five aforementioned cases substantially changed the legal definition of obscenity. Consequently, when these petitioners mailed certain matters a successful prosecution of them for violation of 18 USC 1461 was a virtual impossibility according to this court which said in *Miller* "utterly without redeeming social value"

test was a burden virtually impossible for the prosecution to discharge under our criminal standards of proof.

It is petitioners' position that the indictment and conviction and affirmance and the law upon which it is based clearly do not comport with the said *Miller* requirements; that petitioners now stand convicted of offenses which did not exist at the time they were accused of committing said offenses and of which they had *no notice* whatever; that for these reasons the trial and conviction of the petitioners violated their rights under the due process clause of the Fifth Amendment because petitioners had constitutionally insufficient notice of the offenses which they were called upon to defend themselves against; and further, since the *Miller* decisions, what they were convicted of apparently was not a crime or was impossible to prove at the time.

Pursuant to the then prevailing law, the District Court instructed the jury to apply a national standard. Prior to *Hamling v. United States,* 418 U.S. 102, it could reasonably have been assumed that *Miller* would require reversal of petitioners' conviction without any showing of prejudice. Petitioner Cutting submits that his conviction on Counts 10, 11, 12, 13 and 20 should have, at the very least, been remanded because there is no way to tell on the present record whether or not there is a probability that the excision of the national standard reference would have materially affected the deliberations of the jury or not. Unless that is done it cannot properly be decided whether reversal is or is not required by *Hamling* and *Miller.* We must know whether the national standard was less liberal than a non-national standard before it could

be ascertained whether *Miller* applies at all because its retrospectivity depends upon its *benefiting* an appellant. Unlike *Hamling* or *United States v. Dachsteiner* (1975) 518 F.2d 20, where in those cases evidence was submitted that the local and national standards were similar, the record before us in this case does not contain that. This court in *Miller* expressly recognized and emphasized the existence of differences in local standards by rejecting a national standard that communities might in fact be very different. If that is true, a silent record on the standard applied by the jury in the case, is tantamount to prejudice and denial of due process toward these petitioners. See *Bouie v. City of Columbia* (1964) 378 U.S. 347, 352; *United States v. Jacobs* (Ninth Circuit 1975) 513 F.2d 564, 566.

It is for the foregoing reasons that Certiorari should be granted and the judgment of the United States Court of Appeals for the Ninth Circuit reviewed and further, petitioners request that the judgment of conviction be reversed or at the very least remanded.

Conclusion.

It is respectfully submitted that the Petition for Certiorari should be granted and the decision of the United States Court of Appeals for the Ninth Circuit affirming the conviction of petitioners should be reversed.

Respectfully submitted,

BURTON C. JACOBSON,
Attorney for Petitioners.

EXHIBIT A.

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
U.S. Court of Appeals and Post Office Building
7th & Mission Streets, P.O. Box 547
San Francisco, California 94101

March 26, 1975

USA v. Carl Dennis Cutting & Barry Daniel Still.
71-2570.

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered March 26, 1975 reversing in part & remanding in part the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Clerk
U.S. Court of Appeals

Opinion.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Appellee, v. Carl Dennis Cutting and Barry Daniel Still, Appellants. No. 71-2570.

Appeal From the United States District Court
Central District of California

Filed: March 26, 1975.

Before: BROWNING, HUFSTEDLER, and CHOY, Circuit Judges

HUFSTEDLER, Circuit Judge:

Cutting and Still appeal from their convictions for mailing obscene matter and for mailing advertisements for obscene matter in violation of 18 U.S.C. § 1461. Cutting was convicted upon 12 separate counts; Still was convicted upon 11. Each was fined separately on each count, and each was given concurrent sentences of three years probation on all counts of which he was convicted.

The acts underlying the indictment and the trial itself took place before the 1973 and 1974 obscenity decisions of the Supreme Court. The defendants are therefore entitled to have their convictions measured against the standards of *Roth v. United States* (1957) 354 U.S. 476 and *Memoirs v. Massachusetts* (1966) 383 U.S. 413, unless they would benefit by application of the Supreme Court's more recent decisions. (*Hamling v. United States* (1974) ..... U.S. ...., ... [42 U.S.L.W. 5035, 5039]; *United States v. Jacobs* (9th Cir. 1974) ..... F.2d ..... [slip op'n Sept. 25, 1974].)

Under *Roth-Memoirs* an obscenity conviction is valid only if:

> "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Memoirs v. Massachusetts, supra* at 418.

Count 15 concerns an advertisement unaccompanied by sample photographs. The advertisement is not itself facially obscene. It uses suggestive language, but it does not materially differ from countless advertisements for motion pictures that appear in daily newspapers across the country.[1] No evidence was introduced to establish what material was sent to those who responded to this advertisement.[2] Accordingly, the convictions

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[1]The following description of the offered material appears in the advertisement:

"IN THE ACT"	a woman, a man, as nature intended.
"POSITIVE SUCTION"	Joy helps Sue satisfy a real demanding salesman, who now has a real tale to tell.
"SHE DAMN NEAR KILLED HIM"	June knows how to please all men, and she really leaves this one limp.
"THE INTERNATIONAL SET"	you've heard about it, now see for yourself, two couples in action.
"COMPLETE PHOTO SET"	photographs from the above films.

[2]A film was introduced in connection with a different count, but it was tied to a different advertisement.

on count 15 cannot be sustained. (*Cf. Manual Enterprises v. Day* (1962) 370 U.S. 478; *Grimm v. United States* (1895) 156 U.S. 604.)

The material involved in all of the remaining counts, except five (counts 10, 11, 12, 13, 20 of the Cutting indictment), consists of still photographs of solitary male or female nude models. We can discern no redeeming social value in such material, but we cannot say that it primarily appeals to prurient interests, or that it is so patently offensive as to offend contemporary community standards. (*See, e.g., Central Magazine Sales, Ltd. v. United States* (1967) 389 U.S. 50, *rev'g United States v. 392 Copies of Magazine entitled "Exclusive"* (4th Cir. 1967) 373 F.2d 633; *Potomac News Co. v. United States* (1967) 389 U.S. 47, *rev'g United States v. 56 Cartons Containing 19,500 Copies of Magazine entitled "Hellenic Sun"* (4th Cir. 1967) 373 F.2d 635; *Redrup v. New York* (1967) 386 U.S. 767; *United States v. Arno* (9th Cir. 1972) 463 F.2d 731; *Pinkus v. Pitchess* (9th Cir.) 429 F.2d 416, *aff'd sub nom. California v. Pinkus* (1970) 400 U.S. 922.)

The Government attempted to push these photographs over the constitutional line by offering evidence to evoke concepts of pandering, exploitation of juveniles, or obtrusive advertising. Most of the recipients testified that they had ordered the materials in question or similar materials in the past. There was considerable evidence that the defendants made efforts within the limits imposed by a mail order business to insure that the materials reached only adults. The means of purveying the photographs were not so unusually blatant as to the bring the case into the fold of *Ginzburg v. United States* (1966) 383 U.S. 463.

Still's conviction must be reversed because it rested solely on materials that are constitutionally protected. Cutting's conviction on counts based on the same material cannot stand, but he was also convicted on five counts that were based on materials that can be described as "hard core pornography." (*See Ginzburg v. United States, supra* at 499 (Stewart, J., dissenting).) The materials are still photographs (counts 10, 11, 12, 13) and a motion picture film (count 20) variously depicting, in explicit detail, acts of sexual intercourse, including fellatio and cunnilingus.

The discussion and portrayal of sexual intercourse merit full constitutional protection in many circumstances. "The portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." (*Roth v. United States, supra,* 354 U.S. at 487 (footnote omitted),) The circumstances of the present case, however, do not place these materials within the constitutionally protected zone. There is no story line or theme to the film and no perceivable artistic value in the film or photographs. No text accompanies the film or the photographs that arguably suggest that they might be used for educational or other socially useful purposes.[3] In these circumstances, we have concluded that "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." (*Roth v. United States, supra* at 489.)

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[3]The envelope in which the photographs were delivered and the accompanying flyer described the contents as "adult educational materials," but the exploitive manner in which these materials were distributed, while not amounting to pandering, negates any educational purpose.

Cutting contends that his conviction cannot be sustained because section 1461, as written and as then construed, did not specifically define what depictions of sexual conduct were prohibited, as is required by *Miller v. California* (1973) 413 U.S. 15. The argument was rejected by *Hamling v. United States, supra,* ..... U.S. at ....., holding that its retrospective limiting construction sufficed when the conviction rested on hard core pornography.

However, Cutting may derive other benefit from *Miller v. California, supra.* The jury was instructed to apply national standards to decide whether the material could constitutionally be proscribed. The erroneous instruction was harmless if the local standard was the same as or stricter than the national standard. (*Hamling v. United States, supra,* ..... U.S. at .....; *United States v. Dachsteiner* (9th Cir. 1974) ..... F.2d ..... [slip op'n Dec. 13, 1974].) But here, unlike *Hamling* and *Dachsteiner,* the record is silent on the local standard question. We cannot presume that the local and national standards are the same or that the local standard is stricter than the national standard; indeed, one of the basic assumptions of *Miller* is that local and national standards vary and diverge. (413 U.S. at 30, 32-33.) We are aware of no facts that we can judicially notice that would permit us to resolve the question. Therefore, we are unable to decide on the record before us whether the error in instructing the jury was harmless or prejudicial. Accordingly, we must remand Cutting's case to the district court for the limited purpose of holding an evidentiary hearing on and resolving the local standard issue. The pertinent standard is that prevailing at the time of the acts charged in the indictment.

Still's conviction is reversed with directions to dismiss the indictment. Cutting's conviction on all counts, other than 10, 11, 12, 13, and 20 is reversed with instructions to dismiss those counts of the indictment; on the remaining counts the cause is remanded to the district court for further proceedings consistent with the views herein expressed.

BROWNING, Circuit Judge, concurring and dissenting:

I concur in the reversal of Still's conviction on all counts and the reversal of Cutting's conviction on all counts except 10, 11, 12, 13, and 20. I would affirm Cutting's conviction on these five counts.

I do not believe the question to be whether local and national standards differed, and if so, how. The test for the trier of fact is "whether 'the average person, applying contemporary community standards' would find the work, taken as a whole, appeals to the prurient interest. . . ." *Miller v. California,* 413 U.S. 15, 24 (1973). This is a general standard, not a geographic one. Rejection of a uniform national standard does not necessitate "the substitution of some smaller geographical area into the same sort of formula." *Hamling v. United States,* ..... U.S. ....., ... (1974) (slip opinion at 14). The purpose of the "community standards" instruction is not to distinguish attitudes in one area from those in another, but rather to distinguish personal or aberrant views from the generalized view of the community at large. Instructions referring to the nation as a whole may serve this purpose. *Hamling v. United States, supra,* slip opinion at 17. *See also United States v. Dachsteiner,* ..... F.2d ..... (9th Cir. December 13, 1974) (slip opinion at 2).

The fact finder "is entitled to draw on his knowledge of the views of the average person in the community

or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law." *Hamling v. United States, supra,* slip opinion at 14. The test tends to result in application of "local" attitudes because of the limited area from which the jury is drawn, but this does not make the obscenity standard any more a geographic one than tests involving "the propensities of a 'reasonable' person in other areas of the law."

Thus, when an instruction has been given in terms of a "national" standard, the essence of the question of prejudice is not whether the local standard is different but rather whether the instruction may have led the jury to apply some specialized test that might differ to the defendant's disadvantage from a generalized "average person, applying contemporary community standards" test. In this case, I do not believe it did. I am unable to say, on the present record, that "there is a probability that the excision of the references to the [nation as a whole] in the instruction dealing with community standards would have materially affected the deliberations of the jury." *Hamling v. United States, supra,* slip opinion at 18.

Except for the references to "national" standards in the instructions, there was only one other mention of the matter at trial. In closing argument, defense counsel told the jurors they would be instructed that they must judge the material by a "national" standard. Counsel noted that the prosecution had offered no evidence as to what the "national" standard might be, and argued that it had therefore failed to carry its burden of proof. Defense counsel did not suggest that the "national" standard might be stricter than

the local standard; any possible inference would have been to the contrary. The prosecutor ignored the subject entirely.

Since, as defense counsel said, there was no evidence as to the national standard (and no mention at all of a local standard), there is no basis for supposing that the jury would have assumed the national standard to be more strict than that which the jurors would apply as a result of their background as residents of the Central District of California. Except for defense counsel's statement, there would be no basis for supposing that the national standard might differ from the local standard.

The message conveyed by the instructions as a whole was that the applicable standard was a general one. The jurors were told that they were not to judge the material on the basis either of their personal impression, or of its impact on highly susceptible persons. They were reminded that people differ widely in their views as to the propriety of particular matter, and were admonished to consider the impact of the material on the "average person." These instructions, as a whole, presented the essentials of the "community standards" test and served its principal purposes, even though they contained references to the "national community as a whole." *Hamling v. United States, supra,* slip opinion at 17.

EXHIBIT B.

Opinion.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee v. Carl Dennis Cutting and Barry Daniel Still, Defendants-Appellants. No. 71-2570.

Appeal from the United States District Court for the Central District of California.

Before: CHAMBERS, KOELSCH, BROWNING, DUNIWAY, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE, SNEED, and KENNEDY, Circuit Judges

TRASK, Circuit Judge:

Cutting and Still appeal their convictions, following jury verdicts of guilty, for mailing obscene matter and for mailing advertisements for obscene matter in violation of 18 U.S.C. § 1461. Cutting was convicted on 13 separate counts; Still was convicted on 12. Each was fined separately on each count, and each was given concurrent sentences of three years' probation on all counts of which he was convicted.

I.

The material involved here concerns sample photographs with some description, two advertisements (counts 14 and 15) containing printed material but unaccompanied by photographs, and one reel of motion picture film. Cutting's convictions on five counts involving still photographs (counts 10, 11, 12 and 13) and count twenty, the motion picture film, were based on material that can be described as "hardcore pornography." *See Ginzberg v. United States*, 383 U.S. 463, 499 (1966) (Stewart, J., dissenting). The material

variously depicts, in explicit detail, acts of sexual intercourse, including fellatio and cunnilingus. *See Miller v. California*, 413 U.S. 15, 25 (1973). The remaining material consisted of still photographs of nude females in various frontal postures with legs spread apart and the camera focused upon the genitals. The written material accompanying the photographs made no pretense of representing that they were for any serious artistic, scientific, or literary purpose.

In instructing the jury, the district court told its members that the community to be applied was the national community as a whole. No objection was made to these instructions. Neither side introduced any expert testimony concerning the availability or acceptability of the materials alleged to be obscene at either the national or local levels. The photographs, films, and advertisements were before the jury. Expert testimony is not necessary to enable the jury to judge the obscenity of material which has been placed in evidence before them. *See Hamling v. United States*, 418 U.S. 102, 113 (1974); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 (1973); *Kaplan v. California*, 413 U.S. 115, 120-22 (1973). The jury examined the evidence and returned verdicts of guilty on all counts.

The acts underlying the indictment and trial took place before the 1973 and 1974 obscenity decisions of the Supreme Court of the United States. Appellants are therefore entitled to have their convictions measured against the standards of *Roth v. United States*, 354 U.S. 476 (1957), and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), unless they would benefit by application of the Supreme Court's more recent decisions. *Hamling v. United States*, 418 U.S. 87, 102 (1974);

United States v. Jacobs, 513 F.2d 564 (9th Cir. 1974). It is a general rule that a change in the law which has occurred after a relevant event in a case will be given effect while the case is on direct appeal. *Hamling v. United States, supra* at 102; *Linkletter v. Walker*, 381 U.S. 618, 627 (1965). That rule applies here, and thus the judgments of conviction also must be substantively examined in the light of the principles laid down in the more recent cases. *Hamling v. United States, supra* at 102.

Both the *Memoirs* test,[1] *Memoirs v. Massachusetts, supra* at 418, and the *Miller* test,[2] *Miller v. California, supra* at 24, in the second portion of their tripartite tests, proscribe sexual material which is "patently offensive." In *Miller*, the Court took occasion to give examples of what it meant by "patently offensive":

> "It is possible, however, to give a few plain examples of what a state statute could define for

[1]Under the older *Roth-Memoirs* test, an obscenity conviction is valid only if:

> "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." Memoirs v. Massachusetts, *supra* at 418.

[2]The test enumerated in Miller v. California, 413 U.S. at 24, is as follows:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. *Kois v. Wisconsin, supra*, at 230, quoting *Roth v. United States, supra*, at 489; (b) whether the work depicts or describes, in a patently offensive way sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

> regulation under part (b) of the standard announced in this opinion, *supra:*
>
> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> "(b) Patently offensive representations of descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[3] *Miller v. California, supra* at 25.

The Court in *Hamling v. United States, supra* at 115, said of the material there,

> "It is plain from the Court of Appeals' description of the brochure involved here that it is a form of hard-core pornography well within the *types of permissibly proscribed depictions described in Miller*, and which *we now* hold § 1461 to cover." (Emphasis added.)

[3]In describing what the states "could" proscribe, it appears that the Court was clearly at the same time stating what the federal statutes did proscribe.

That this is a correct reading of the meaning of the Court, we observe that in United States v. 12 200-ft. Reels of Film, 413 U.S. 123, 130 n. 7, the Court said:

> "We further note that, while we must leave to state courts the construction of state legislation, we do have a duty to authoritatively construe federal statutes where '"a serious doubt of constitutionality is raised"' and '"a construction of the statute is fairly possible by which the question may be avoided."' *United States v. Thirty-seven Photographs*, 402 U.S. 363, 369 (1971) (opinion of WHITE, J.), quoting from *Crowell v. Benson*, 285 U.S. 22, 62 (1932). If and when such a 'serious doubt' is raised as to the vagueness of the words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe regulated material in 19 U.S.C. § 1305(a) and 18 U.S.C. § 1462, see *United States v. Orito, post*, at 140 n. 1, *we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in Miller v. California, ante, at 25.*" (Emphasis added.)

Thus, the Court in *Hamling* defined for purposes of section 1461 what constitutes hard-core pornography and found that it is made up in part at least by the examples listed in *Miller*.

To the argument made in *Hamling* that because the crime for which convictions had been obtained had not been enumerated in the statute at the time of their conduct, the convictions could not be sustained, the Court responded:

> "But the enumeration of specific categories of material in *Miller* which might be found obscene did not purport to make criminal, for the purpose of 18 U.S.C. § 1461, conduct which had not previously been thought criminal." *Hamling v. United States, supra* at 116.

The *Hamling* Court, *supra* at 114, to the same effect also said:

> "As noted above, we indicated in *United States v. 12 200-ft. Reels of Film,* [413 U.S. 123,] 130 n. 7 [(1973)] that we were prepared to construe the generic terms in 18 U.S.C. § 1462 to be limited to the sort of 'patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller v. California.*' We now so construe the companion provision in 18 U.S.C. § 1461, the substantive statute under which this prosecution was brought."

II.

It is for this court to determine whether the jury could constitutionally find the materials obscene, in light of the tests enumerated by the Supreme Court as well as the examples of patently offensive materials

listed in *Miller v. California. Hamling v. United States, supra* at 100. What appeals to the prurient interest and is patently offensive are essentially questions of fact, *Miller v. California, supra* at 30; the issue of obscenity must, in the first instance, be left to the trier of fact, be it a properly instructed jury or a trial judge.

> "The general rule of application is that '[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it.' *Glasser v. United States,* 315 U.S. 60, 80 (1942)." *Hamling v. United States, supra* at 124.

But if it appears that the verdict is not supported by substantial evidence, a reviewing court has an obligation to set that verdict aside if the finding be one of obscenity. *See Jacobellis v. Ohio,* 378 U.S. 184, 190 & n. 6 (1964) (Brennan, J.). There is a limit beyond which a jury may not go in determining that certain materials are obscene. *See Hamling v. United States, supra* at 114. A jury in an obscenity case may not act upon considerations of passion and prejudice and in disregard of the court's instructions any more than it could in other fields of law.

In *Jenkins v. Georgia,* 418 U.S. 153 (1974), a jury was instructed on obscenity under a Georgia statute in language substantially similar to the definition used in *Memoirs.* See note 1 *supra.* The material under question was the movie film, "Carnal Knowledge." There was substantial evidence of the quality of the film from an artistic standpoint, yet the jury found it to be obscene, and the Supreme Court of Georgia affirmed by a divided court. On appeal to the Supreme Court, probable jurisdiction was noted, 414 U.S. 1090

(1973), the conviction reviewed, and the judgment reversed. The Court pointed out that while questions of appeal to the " 'prurient interest' " or of "patent offensiveness" are " 'essentially questions of fact,' " juries do not have "unbridled discretion" to make their own determination of what is " 'patently offensive.' "[4] 418 U.S. at 160. The Court then pointed out that there was nothing in the film which under the *Miller* standards and illustrations could be said to meet those requirements.

> "While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including 'ultimate sexual acts' is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards." *Id.* at 161.

The photographs in this proceeding do not fall within the description of the artistic material in *Jenkins*. Five counts involve explicit sex. There is no story line or theme to the film and no perceivable artistic value to the film or the four photographs. The other photographs are of female nudes so posed that a jury could quickly find that the sole purpose was to emphasize a lewd portrayal of genitals. Again, there was no pretense of artistic, scientific, or literary value con-

[4]The opposite situation when the material is patently obscene and the jury makes a finding of non-obscenity has not been passed upon by the Supreme Court nor do we decide that question here.

nected with them. The jury was well within its province in finding them obscene—and its verdict is supported by substantial evidence.

III.[5]

Cutting also contends that he was prejudiced because the district court instructed the jury that in determining obscenity the jury was to apply the standard of the average person "in the national community," the then prevailing law under *Memoirs. Miller v. California, supra,* rejected the national standard and substituted a "contemporary community standards" test. 413 U.S. at 33. In *Hamling v. United States, supra* at 102, the Court held *Miller* retroactive with respect to cases on direct appeal when *Miller* was decided, as this case was. *Hamling* explained that in such a case as this "reversal is required only where there is a probability that the excision of the reference to 'the nation as a whole' in the instruction dealing with community standards would have materially affected the deliberations of the jury." 418 U.S. at 108. After considering the record and the charge as a whole, we conclude that the jury deliberations in this case would not have been materially affected by excision of references to the national standard. *See United States v. Ratner,* 502 F.2d 1300, 1302 & n.3 (5th Cir. 1974).

Except for the reference to "national" standards in the instructions, there was only one other mention of the matter during the trial of this case. In closing argument, defense counsel told the jurors they would be instructed that they must judge the material by

[5]The portion of the opinion in this section was prepared by Judge Browning for an earlier draft and is used verbatim with his permission, having met the approval of a majority of the court.

a "national" standard. Counsel noted that the prosecution had offered no evidence as to what the "national" standard might be, and argued that it had therefore failed to carry its burden of proof. Defense counsel did not suggest that the "national" standard might be stricter than the local standard. The prosecutor ignored the subject entirely.

Since, as defense counsel said, there was no evidence as to the national standard (and no mention at all of a local standard), there is no basis for supposing that the jury would have assumed the national standard to be more strict than that which the jurors would apply as a result of their background as residents of the Central District of California. Except for defense counsel's statement, there would be no basis for supposing that the national standard might differ from the local standard.

The message conveyed by the instructions as a whole was that the applicable standard was a general one. The jurors were told that they were not to judge the material on the basis either of their personal impression, or of its impact on highly susceptible persons. They were reminded that people differ widely in their views as to the propriety of particular matter, and were admonished to consider the impact of the material on the "average person." These instructions presented the essentials of the "community standards" test and served its principal purposes, despite the references to the "national community as a whole." *Hamling v. United States, supra,* 418 U.S. at 107.

It would not be appropriate to remand for an evidentiary hearing in an effort to determine whether the national standard was more strict than that prevailing in the Central District of California when the

mailings occurred. Under *Miller* the question for the trier of fact is "whether 'the average person, applying contemporary community standards' would find the work, taken as a whole, appeals to the prurient interest. . . ." *Miller v. California, supra,* 413 U.S. at 24. This is a general standard, not a geographic one. Rejection of a uniform national standard does not necessitate "the substitution of some smaller geographical area into the same sort of formula." *Hamling v. United States, supra,* 418 U.S. at 104. The purpose of the "community standards" instruction is not to distinguish attitudes in one area from those in another, but rather to distinguish personal or aberrant views from the generalized view of the community at large. Instructions referring to the nation as a whole may serve this purpose. *Hamling v. United States, supra,* 418 U.S. at 107. *See also United States v. Dachsteiner,* 518 F.2d 20 (9th Cir. 1975).

The fact finder "is entitled to draw on his knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination. . . ." *Hamling v. United States, supra,* 418 U.S. at 104. The test tends to result in application of "local" attitudes because of the limited area from which the jury is drawn, but this does not make the obscenity standard any more a geographic one than tests involving "the propensities of a 'reasonable' person in other areas of the law." *Hamling v. United States, supra,* 418 U.S. at 104-05.

Thus, when an instruction has been given in terms of a "national" standard, the essence of the question of prejudice is whether the instruction may have led the jury to apply some specialized test that might differ to the defendant's disadvantage from a generalized

"average person, applying contemporary community standards" test. In this case, as we have said, we do not believe it did.

Hamling and *Dachsteiner* do not stand for the proposition that an erroneous instruction to apply national standards is harmless only if the local standard was the same as or stricter than the national standard. Prejudice does not depend on whether the standards differ in fact, but whether the jury thought they did. A remand to determine whether the national standard is more or less strict than the local standard would be an exercise in futility. To be relevant to the question of prejudice the hearing would have to determine whether the jurors thought the two standards differed, and, if so, whether they thought the national standard was the stricter. Obviously such a hearing would be inappropriate. The question of prejudice is to be resolved on what the record shows as to the probability that the reference to a national standard would have materially affected the deliberations of the jury. *Hamling v. United States, supra,* 418 U.S. at 108.

In both *Hamling* and *Dachsteiner* the national standards instruction was held harmless because nothing in the record indicated the jury thought the national standard which it was to follow, was more strict than any other standard. This is true in the present case. In *United States v. Henson,* 513 F.2d 156 (9th Cir. 1975), on the other hand, a new trial was ordered because "the Government may have succeeded in its attempt to convince the jury" that the national standard was more strict than that in California. The court in *Henson* stated that the "prosecutorial attempt to separate and differentiate a 'national standard' from the defense testimony concerning the attitudes of Californians" distinguished *Henson* from *Hamling* and *Dachsteiner. United States v. Henson, supra,* 513 F.2d at 158.

It is true that there was some evidence that the two standards were the same in both *Hamling* and *Dachsteiner.* But the presence of this evidence did not determine the result in either case. It "only serve[d] to confirm" the conclusion of the court in *Hamling* that the references to a "national" standard did not require reversal 418 U.S. at 110. Similarly, in *Dachsteiner,* the emphasis was not upon the presence of some evidence of similarity in standards, but upon the fact that the "record contains no evidence that would have tended to persuade the jury that national standards of obscenity are more strict than those" in the district in which the case was tried. *United States v. Daschsteiner, supra,* 518 F.2d at 22.

Finally, it is argued that it would be a violation of due process to deny appellants an opportunity to try the "local standards" issue. The *Hamling* majority rejected this position. As our court noted in *Dachsteiner:*

> "This argument is foreclosed by *Hamling.* There, the trial was also completed before *Miller* and *12 200-ft. Reels of Film* were decided, 418 U.S. at 97, 94 S.Ct., 2887. The Supreme Court nevertheless found an absence of prejudicial error, relying only on the record before it. 418 U.S. at 107, 94 S.Ct. 2887. We do likewise here. Having examined the record, we find no indication that the erroneous instructions in this case 'materially affected the deliberations of the jury.'" *United States v. Dachsteiner, supra,* 518 F.2d at 22, *quoting Hamling v. United States, supra,* 418 U.S. at 108.

Still's conviction is affirmed as to counts 1 to 5 inclusive, count 7, and as to counts 16 to 19 inclusive. Cutting's conviction is affirmed as to counts 1, 2, 5, 8 and 9; also as to 16 to 19 inclusive; and as to 10 to 13 inclusive and count 20. Convictions of both Cutting and Still on counts 14 and 15 are reversed, and because no convictions on these two counts could possibly be maintained we direct that as to them the indictments be dismissed.

HUFSTEDLER, Circuit Judge, dissenting, with whom Circuit Judges Koelsch, Ely, and Choy concur; Circuit Judge Browning concurs in Part I of Judge Hufstedler's dissenting opinion.

I dissent from the majority's affirmance of the convictions of both Cutting and Still.

I

Other than count 15, which the majority agrees should be dismissed, all of the counts against Still and all of the counts against Cutting, except counts 10, 11, 12, 13, and 20, involve still photographs of solitary male or female nude models. Although I discern no redeeming social value in these photographs, I cannot say that this material primarily appeals to prurient interests, nor that it is so patently offensive as to offend contemporary community standards, however much it may offend my own standards or that of my brothers.

The majority opinion attempts to justify its conclusion that these solitary nude photographs are obscene by referring to the reformulation of the "patently offensive" concept stated in *Miller v. California* (1973) 413 U.S. 15; particularly, that portion of *Miller* explaining that states could proscribe "(b) Patently offen-

sive representations . . . of . . . lewd exhibition of the genitals." Although I have difficulty reconciling that language with *Miller's* basic "sexual conduct" limitation on the regulation of pornography (413 U.S. at 24) and I am unable to define what representations are "patently offensive," or what kind of exhibitions are "lewd," within the meaning of *Miller,* I do know that the quoted *Miller* standard is a substantial departure from that of *Roth-Memoirs* as applied to photographs of solitary nude models. Before *Miller,* the Supreme Court had repeatedly given constitutional protection to such photographs, no matter how unattractive were the models' physical endowments and no matter how tastelessly the models were posed. (*E.g., Central Magazine Sales, Ltd. v. United States* (1967) 389 U.S. 50 *reversing United States v. 392 Copies of Magazine Entitled "Exclusive"* (4th Cir. 1967) 373 F.2d 633; *Potomac News Co. v. United States* (1967) 389 U.S. 47 *reversing United States v. 56 Cartons Containing 19,500 Copies of Magazine Entitled "Hellenic Sun"* (4th Cir. 1967) 373 F.2d 635; *Redrup v. New York* (1967) 386 U.S. 767; *United States v. Arno* (9th Cir. 1972) 463 F.2d 731; *Pinkus v. Pitchess* (9th Cir. 1970) 429 F.2d 416, *affirmed sub nom. California v. Pinkus* (1970) 400 U.S. 922.)

Miller cannot be applied retroactively to deny constitutional protection to materials that were protected under *Roth-Memoirs.* The Court in *Hamling v. United States* (1974) 418 U.S. 102, explicitly held that *Miller* could be retroactively applied only to those appellants who would benefit from *Miller.*

The Government attempted to push these photographs over the *Roth-Memoirs'* line by offering evidence to evoke concepts of pandering, exploitation of juveniles,

or obtrusive advertising. Most of the recipients testified that they had ordered the materials in question or similar materials in the past. There was considerable evidence that appellants made efforts within the limits imposed by a mail order business to insure that the materials reached only adults. The means of purveying the photographs were not so unusually blatant as to bring the case into the fold of *Ginzburg v. United States* (1966) 383 U.S. 463.

Still's conviction should be reversed because it rested solely on materials that are constitutionally protected; Cutting's conviction upon counts based on the same materials should also be reversed.

II

This record does not justify the conclusion that the error in giving the national standard instruction was not prejudicial. Cutting could not and did not try this standards issue. The refusal of the majority to remand the case for an evidentiary hearing to ascertain the existence of prejudice deprives him from ever trying the issue and thus deprives him of due process of law.

Pursuant to then prevailing law, the district court instructed the jury that, in determining obscenity as a matter of fact, it was to apply the standard of the average person "in the national community at the time of the . . . mailing." As in *Miller v. California* (1973) 413 U.S. 15, this instruction stated "a 'national standard' of First Amendment protection enumerated by a plurality of this Court, [and] was correctly regarded at the time of trial as limiting state [and federal] prosecution under controlling case law." (413 U.S. at 30-31.) *Miller* rejected the national standard

and substituted the "contemporary community standards" test. (*Id.* at 33.)

Before *Hamling*, we could reasonably have assumed that *Miller* would require reversal of their convictions because we could have anticipated that *Miller* would be fully retroactive and that the constitutional error would compel reversal without regard to any showing of prejudice, unless, perhaps, the Government could demonstrate in a particular case that the error was harmless beyond a reasonable doubt. (*E.g.*, *Burgett v. Texas* (1969) 389 U.S. 109; *Chapman v. California* (1967) 386 U.S. 18.) In *Hamling*, however, the Court held that *Miller* is retroactive only in respect of those cases on direct appeal when *Miller* was decided and only as to those appellants who would benefit from *Miller* (418 U.S. at 102).[1] *Hamling* also departed from the traditional rules governing the effect of constitutional error when it applied t Miller a new rule that was drawn from cases considering non-constitutional errors: "[R]eversal is required only where there is a probability that the excision of the reference to 'the country as a whole' in the instruction dealing with community standards would have materially affected the deliberations of the jury. *Cf. Namet v. United States*, 373 U.S. 179, 190-91 (1963); *Lopez v. United States*, 373 U.S. 427, 436 (1963)."[2] (418 U.S. at 108.)

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[1]The Court did not relate its retroactivity holding to any of the criteria developed in Linkletter v. Walker (1965) 381 U.S. 618, and its progeny, by which retroactivity had been theretofore decided.

The most recent decision collecting the cases and discussing the retroactivity concept is United States v. Peltier (1975) 422 U.S. 531. The criteria there discussed are irrelevant in the obscenity context.

[2]In *Namet*, the Court said: "No constitutional issues of any kind are presented." (373 U.S. at 185.) In *Lopez*, the

(This footnote is continued on next page)

I agree that reversal of Cutting's conviction on counts 10, 11, 12, 13 and 20 is not compelled because I cannot say on the present record that there is a probability that excision of the national standard reference "would have materially affected the deliberations of the jury." (*Id.*) But neither can I say that the probability does not exist. The record is silent. A remand is both necessary and appropriate to permit the record to be developed; thereafter and not before, can we properly decide whether reversal is or is not required by *Hamling* and *Miller*. Indeed, until we know whether the national standard was less liberal than a non-national standard, we cannot ascertain whether *Miller* applies at all because its retrospectivity depends upon its benefiting an appellant.[3]

This record is not like that in *Hamling*, or *United States v. Dachsteiner* (9th Cir. 1975) 518 F.2d 20. In those cases, there was evidence that the "local"[4] and national standards were similar. The record before

reference is to the rejection of claimed error in the district court's refusal *sua sponte* to charge the jury on entrapment.

[3]Since we are as yet uncertain if *Miller* applies to this case, we should not decide that the jury was not "materially affected" by the instruction. (*Cf.* Bowen v. United States (1975) 422 U.S. 916, 921.)

[4]I use the term "local" pejoratively because the Supreme Court has never defined the community to which *Miller* refers when it stated the test in terms of "contemporary community standards." (*See* Hamling v. United States, *supra*, 418 U.S. at 413 (Brennan, J., dissenting).)

The Court has said that "community" can be defined in geographical terms (Miller v. California, *supra*, 413 U.S. at 33-34), and, perhaps, by Congress in national terms ("What Miller makes clear is that state juries need not be instructed to apply 'national standards'." Jenkins v. Georgia (1974) 418 U.S. 153, 157), but no geographical referent is constitutionally compelled. (*Id.* at 157.) "Community" can refer to the vicinage from which the jury is drawn (Hamling v. United States, *supra*, 418 U.S. at 105), but "community" need not be confined to the vicinage. (*Id.* at 106.)

us provides no help at all in trying to decide whether *Miller* would have benefited this appellant or whether the jury was probably affected by the error, if *Miller* were applied.

The materials in this case are sexually oriented, and they would surely offend some communities. But that observation provides no basis upon which to assume that (1) the jurors disobeyed the instruction and applied a hypothetical average person in some "community" other than the nation, or (2) the jurors obeyed the instruction, but concluded that whatever the national standard was, it was no different from the standard of their own vicinage, or, if there were any difference, the local standard was stricter. To the contrary, in the absence of any evidence in the record about levels of tolerance, the appropriate assumption is that "local" attitudes and national attitudes, in fact, differ. The Supreme Court in *Miller* expressly emphasized the existence and importance of such differences in rejecting a national standard. (413 U.S. at 30, 32-33.) With an inference, if not a presumption, that community standards differ from the national standard and that local communities differ from one another, we cannot conclude from a silent record that the standard applied by the jury in this case was the same or similar to the standard that they were instructed to apply. Our analysis properly begins with the premise that the standards are different. No justification exists for deciding by logic or by common experience that the difference is that a non-national standard is always stricter than the former national standard. Without such justification, the affirmance deprives Cutting of any notice and any opportunity to be heard on the standards issue. Rudimentary concepts of due process

forbid that result. (*Cf. Bouie v. City of Columbia* (1964) 378 U.S. 347, 352; *United States v. Jacobs* (9th Cir. 1975) 513 F.2d 564, 566.)

The Government argues that a remand for an evidentiary hearing is contrary to *Paris Adult Theatres v. Slaton* (1973) 413 U.S. 49, which held that the Government need not offer any evidence on community standards in trying an obscenity case. The Government's argument misses the point. A remand would be in no respect a retrial of this obscenity case. The issues to which the evidentiary hearing would be directed are (1) whether Cutting would have benefited from retrospective application of *Miller,* and (2) whether the instruction upon national standards probably affected the jury.

I would reverse Still's conviction with instructions to dismiss the indictment. I would reverse Cutting's conviction with instructions to dismiss all counts of the indictment, except counts 10, 11, 12, 13 and 20, and as to those counts, I would remand for an evidentiary hearing in accordance with the views herein expressed.

/s/ Shirley Hufstedler

BROWNING, Circuit Judge, concurring in part, dissenting in part:

I concur in Part III of the majority opinion, affirming Cutting's conviction on counts 10, 11, 12, 13, and 20. I dissent from the remainder of the majority opinion for the reasons stated in Part I of Judge Hufstedler's dissenting opinion. I would reverse Cutting's conviction on all other counts, and reverse Still's conviction on all counts.

EXHIBIT C.

Order.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. Carl Dennis Cutting and Barry Daniel Still, Defendants-Appellants. No. 71-2570.

FILED: June 30, 1976.

It is ordered that the following changes be made in the majority opinion in the above-entitled case:

1. Change the second sentence of page 1 to read: "Cutting was convicted on 12 separate counts; Still was convicted on 11."

2. Page 3, lines 17 and 18 to:
"(b) Patently offensive representations or descriptions of masturbation, . . ."

3. Page 10, beginning line 23 to the end of the paragraph to read:

"Cutting's conviction is affirmed as to counts 1, 2, 6, 8 and 9; also as to counts 10 to 13 inclusive; and as to counts 16 and 20. Convictions of both Cutting and Still on count 15 are reversed, and because no convictions on this count could possibly be maintained we direct that as to this count the indictment be dismissed."